

Office of Motor Carriers Federal Motor Carrier Safety Regulations: Waivers, Exemptions, and Pilot Programs

47544

FHWA 98-4145-11

DEPT. OF TRANSPORTATION
DOCKET SECTION

98 DEC -3 AM 11:07

Public Meeting

Thursday, August 20, 1998

Held by the
Federal Highway Administration
Washington, DC

*Audio Associates
9537 Elvis Lane
Seabrook, Maryland 20706
301/577-5882*

I N D E X

	<u>Page</u>
American Trucking Associations, Inc. David J. Osiecki	
AAA Susan Pikrallidas	24
Auto club South Kevin Bakewell	28
Automobile Club of Southern California Dan Beal	31
Associated General Contractors Brian Deery	40
Petroleum Marketers Association Kristen Manos	44
Advocates for Highway and Auto Safety Gerald Donaldson	53

FEDERAL MOTOR CARRIER SAFETY REGULATIONS

WAIVERS, EXEMPTIONS AND PILOT PROGRAM

- - - - -

MR. BRENNAN: Good morning, everybody. Welcome to the Department of Transportation, Federal Highway Administration Office of Motor Carriers.

My name is Paul Brennan. I'm the director of the Office of Research and Standards and this is Jill Hochman, who is the director of planning and customer liaison. I kind of stumbled over that.

We're here today to conduct a public hearing or meeting on an issue that has come up in the TEA-21, the Transportation Equity Act for the 21st Century, which was enacted on June 9th.

It's kind of a monumental piece of legislation. It authorizes our new federal highway program for the next six years and it has many provisions in there of interest. But today we're going to limit our interest to one section, which is Section 4007.

And 4007 provides authority for waivers, exemptions and pilot demonstration projects. We believe it's a rather significant piece of legislation and it's a significant piece of our program, our Motor Carrier Safety Program, because it gives us the kind of research -- or we think it will give us the kind of flexibility we need to

1 craft a better set of rules and continually review the rules
2 and implement new and emerging technologies and things into
3 the rules.

4 So we are looking forward to implementing it. We
5 have a direction in the bill, in the act, to implement
6 within 180 days, which we have kind of computed out to be
7 December 6th.

a So we do intend to have the rule completed by
9 December 6th. We began to craft a notice of proposed rule-
10 making, and we decided that it would be a good idea to have
11 this first opportunity to hear what other people may have
12 perceived as being contained in this new authority.

13 Just a little background. We first got our
14 authority through the ICC, when we were the ICC back in
15 1935, and that kind of just gave us broad general authority
16 to regulate -- which included the inherent authority to
17 waive and exempt from those regulations.

18 Actually, it wasn't until 1984 when Congress
19 addressed the issue of waivers and exemptions and, although
20 some people say that that gave us the power to waive some of
21 the regulations, in essence I believe it really severely
22 restricted our ability to waive regulations because it
23 didn't provide the standards or some criteria upon which we
24 would issue these waivers.

25 We also had similar legislation in 1986 regarding

1 the commercial driver's license, and it **adopted** similar
2 language -- the same language as from the '84 Act.

3 So in this act, this new expression of our waiver
4 authority, it provides for three different kinds of
5 exceptions from our rules.

6 One is the very short-term waivers, kind of
7 exigencies to take care of kind of minor events -- or maybe
a they're major events when they occur, but minor events in
9 terms of our regulatory scheme so that we could waive the
10 regulations for short-term.

11 So that example I think they used in the
12 legislative history is a circus coming to town and they may
13 get the circus vehicles from the train station down to the
14 arena, and they don't necessarily meet all of the standards
15 in our regulations -- that kind of thing.

16 So it's a kind of a short-term project, up to
17 three months. And then there's the exemptions, and the
18 exemptions is the longer term, two-year, but renewable for
19 another two years.

20 And those would be more in the way of leading to
21 something or taking care of a temporary situation which may
22 last for a fairly long period of time.

23 And then the third area is the pilot demonstration
24 projects, which are also leading to something. And it kind
25 of fits in with our approach, our new approach.

1 Our zero-based approach to regulations is that we
2 don't really want to regulate through waivers and
3 exemptions, we want to regulate through regulations and we
4 want to change and amend the regulations when they're
5 necessary to be amended and changed, and not try to rule by
6 exception.

7 So we really think that this is right in line with
8 the thinking of the agency now, that we want to eventually
9 -- or we want to get things into the regulations and
10 permanent regulation as quickly as possible.

11 So the exemptions process is begun by a request
12 from the outside. The pilot demonstration projects is begun
13 by internal initiative. Of course, I don't think that's
14 necessarily mutually exclusive.

15 I think that we could probably prompt somebody to
16 ask if we had to -- wanted to initiate an exemption. Or we
17 could in fact respond to somebody's asking by initiating a
18 pilot demonstration project.

19 But that's something that we may hear comments
20 about. Anyway, so I don't know of any further background
21 necessary. We will be here all day. We will be here to
22 share any information that we might have with you.

23 We have not proposed anything yet. We have not
24 begun to draft a proposal -- well, we have begun to draft a
25 , proposal; I shouldn't say that.

1 But we have not decided on any kind of content,
2 full content of the proposal. We're just kind of drafting
3 the outline. We intend to get it out pretty quickly after
4 this.

5 We will accept the comments today, whether you
6 have it orally or in writing. We do have a stenographer --
7 well, I guess we'll call you a stenographer -- to take down
a the comments that are made and we will accept any written
9 comments that you want.

10 The docket will be open for -- how much longer?

11 A PARTICIPANT: Today.

12 MR. BRENNAN: Today. Close of today. Get your
13 comments in. If we do get late comments in, we generally
14 accept late comments as long as we have not made a decision
15 by the time we receive those comments, and we certainly
16 haven't made a decision yet.

17 So are there any questions?

18 (No response.)

19 MR. BRENNAN: Without further ado then, we will
20 call our first witness. And where's our list? Rob Abbott
21 from the American Trucking Associations. No? Dave Osiecki
22 speaking for Robert Abbott.

23 Let the record show that Mr. Osiecki has submitted
24 a copy of his comments.

25

AMERICAN TRUCKING ASSOCIATION

MR. OSIECKI: Good morning. I have to admit I didn't know I was the first one up this morning, but I certainly am prepared, I believe.

My name is Dave Osiecki, and I am the vice president of safety policy for the American Trucking Associations, Inc. As you may know, ATA is the national trade association for the trucking industry.

We're a federation which includes more than 3,000 direct motor carrier members, 50 affiliated trucking associations -- one in every state -- and 14 trucking segment-specific conferences.

As a federation, we represent every type and class of motor carrier in the country. Combined with our direct membership, we are a federation of over 35,000 member trucking companies.

We appreciate the opportunity to be heard today, and would like to thank FHWA for scheduling this public meeting. As the agency realizes, the issue of regulatory waivers and exemptions has generated substantial interest in the recent past.

One of the reasons for such interest is the attempted implementation of previous waiver authority by the agency.

We support the new authority granted to FHWA in

1 Section 4007 of the recently enacted TEA-21. The agency
2 unquestionably should have the flexibility to grant short-
3 term waivers and longer term regulatory exemptions when the
4 need is justified and when highway safety is not
5 compromised.

6 Judicial and agency interpretations of previous
7 waiver authority were simply unworkable, and we are pleased
8 the agency has gained this new, more realistic statutory
9 language.

10 In addition, Federal Highway should have the
11 ability to promote and test regulatory alternatives as part
12 of controlled pilot programs. Pilot programs initiated
13 under this authority hold real promise for the future
14 development of more performance-based regs, and the trucking
15 industry is anxious to work with Federal Highway to develop
16 and implement programs that could hold real promise for
17 improving highway safety.

18 We agree that waivers and exemptions should be
19 granted judiciously. This new authority gives Federal
20 Highway the ability to test alternatives or to address
21 special circumstances.

22 The authority should not be used to grant
23 exemptions simply for the sake of regulatory relief. We
24 anticipate that some industry segments may request relief
25 during their busy seasons. We would oppose, as we hope the

1 agency would, such exemptions.

2 We are very encouraged by the meeting today to
3 discuss the thoughts and ideas that will assist you in
4 implementing this authority. We hope, however, that the
5 information provided today does not result in any
6 unnecessary delays in the development and publication of
7 procedural regulations.

8 And I was encouraged to hear, as an aside, that
9 you plan to issue the procedural regs, at least in a notice
10 format, soon after this meeting.

11 The six-month time frame established in TEA-21 for
12 implementation of the procedures is realistic and we
13 strongly encourage Federal Highway to beat that deadline.

14 At the outset, we also want to stress our belief
15 that TEA-21 is clear in terms of its distinctions between
16 waivers and exemptions, as you indicated. And the
17 distinction was made for obvious reasons, which I will
18 discuss briefly in a few minutes.

19 The Act was also clear in establishing some
20 minimum procedures that must be included in the regs issued
21 by the agency. But as FHWA's notice on this issue correctly
22 points out, there are a few procedural areas that are not
23 addressed in the legislation.

24 And I hope to provide some useful information in
25 my statement here today and in the written comments which I

1 have placed in the docket.

2 However, I want to stress both now and later in
3 these comments that Federal Highway should not attempt to
4 start from scratch in developing these procedures. There
5 are existing procedures in use that have served government
6 fairly well.

7 Federal Highway should use its recent and less
8 than successful experience with its "10 to 26" demonstration
9 program to help guide the development of procedures that
10 will apply to pilots.

11 In other words, Federal Highway doesn't have to,
12 nor should it try to, reinvent the wheel. Rather, it should
13 rely on feedback from recent experience and on existing
14 procedural models as it moves forward.

15 I'd like to touch our thoughts and ideas on the
16 procedural rules themselves now. Federal Highway has a
17 history of developing safety rules that are very
18 prescriptive and that are enforced through verification of
19 compliance.

20 This is not a criticism, just a statement of fact.
21 Recently, however, the agency has begun developing programs
22 -- and I'll distinguish programs from regulations -- such as
23 Safestat that attempt to measure a motor carrier's on-road
24 safety performance.

25 And while the agency's regulations may always

1 include some prescriptive requirements simply because of the
2 nature of regulation, when developing any new rules Federal
3 Highway should attempt to make them performance-oriented
4 wherever possible.

5 And in this case, we encourage the agency to build
6 performance criteria and performance measurements into these
7 rules. Examples of such criteria are appropriate recordable
8 accident rates -- DOT-recordable accident rates, that is --
9 and driver or vehicle out-of-service rates.

10 And I also might **add**, although it's not in the
11 written comments at this point, the driving history and
12 driving record of drivers, we believe that that's a fairly
13 good predictive measure of future performance of driving.

14 However, maybe more than anything else, the
15 procedural rules should be simple and straightforward. I
16 mentioned that there are models that FHWA can use. The
17 Research and Special Programs Administration maintains an
18 exemption program governed by relatively straightforward
19 procedures.

20 The regs address the application process,
21 including the applicant's exemption justification, RSPA's
22 application evaluation process, and other issues.

23 While RSPA's procedures may not be entirely
24 applicable for Federal Highway and in some cases may be more
25 detailed than is necessary, we believe they are relatively

1 simple and understandable and workable.

2 They address the necessary procedures, and we know
3 that they have served both the industry and the government
4 fairly well, as I indicated. We believe you should review
5 those procedures, speak with RSPA officials, and borrow
6 those elements that you believe are appropriate and have
7 worked.

8 I'd like to touch on the waiver issue briefly. As
9 I mentioned above, TEA-21 made a clear distinction between
10 waivers and exemptions. With respect to waivers, since they
11 are for a short duration and are intended to be limited in
12 scope to address unique circumstances, there should be fewer
13 entry hurdles for applicants, as well as less monitoring by
14 the government.

15 Applicants should be required to describe the
16 circumstances that make their operations so unique as to
17 support a limited waiver, and why there is a reasonable
18 public interest -- because that is one of the legislative
19 tests.

20 Applicants must also be required to describe the
21 safety controls that will be put in place in order to
22 mitigate any potential safety concerns. And since waivers
23 will be limited in duration, Federal Highway, as I
24 indicated, should limit the amount of monitoring or
25 reporting involved.

1 And we believe in some cases maybe there is no
2 reporting and maybe there is no monitoring, depending on the
3 circumstances.

4 I'd like to address how Federal Highway should
5 handle waivers by describing some recent real life examples
6 of some candidates for some waivers, and why they probably
7 meet the new statutory tests.

8 And while I won't go through the entire paragraph
9 here, because you've already mentioned it, one of the recent
10 examples is this traveling carnival company that was
11 mentioned, I believe, in the legislative history.

12 Essentially the company moves all of its carnival
13 equipment on the railroad, goes to different cities. From
14 the rail yard to the setup location for the carnival is a
15 matter of miles.

16 The company has antique trucks that don't
17 necessarily meet the regulatory requirements. They move in
18 slow, in parade-like fashion, in some cases even being
19 escorted by the local police.

20 And we believe that that's a specific example
21 where it meets the tests for a waiver, a limited, short-
22 duration waiver. And as you may know, when that request was
23 posed to Federal Highway, Federal Highway did not have the
24 ability to issue that particular waiver. Now we think you
25 do.

1 Another example is the recent case of a retired
2 five-star general who wanted to show his support for the
3 trucking industry which had made a contribution to the
4 general's favorite charitable cause.

5 During a media event, the general wished to
6 operate a truck for a few blocks. The general did not have
7 a CDL and needed a CDL waiver to operate the truck legally
a for those few blocks.

9 All of the elements to meet the waiver test were
10 there. And the waiver was for a limited duration --
11 literally, a matter of minutes; it was unique because five-
12 star generals don't often desire to drive large trucks; and
13 safety concerns were addressed by having a properly licensed
14 driver ride with the general.

15 And also, some of the streets in the local area
16 were blocked off. So the public interest test was met as
17 well, due to the nature of the event.

18 My objective in providing those examples is to
19 illustrate that some legitimate waiver requests can probably
20 be accomplished in simply one or two pages of information.
21 I wanted to make it clear that the conditions attached to
22 waivers can and should vary, depending on the regulation
23 being waived.

24 Federal Highway should be sensitive to the
25 different types of legitimate requests it may receive, and

1 develop simple procedures that promote safety, **provide**
2 flexibility in the number and type of conditions and
3 monitoring imposed, and allow the interested parties to
4 apply for and comply with the waivers without having to hire
5 two attorneys and a couple of safety consultants to do so.

6 Additionally, because of the way in which regs are
7 written, enforcement of them does not always meet their
8 intent. Clearly, the intent of the regs is not to regulate
9 scenarios like the ones I just described.

10 However, strict reading of the law requires the
11 affected parties to comply. This new authority gives
12 Federal Highway the tools to address these special
13 circumstances.

14 Now I'd like to touch on the exemption issue.
15 Federal Highway was given fairly clear direction on the
16 exemption procedures in terms of application information,
17 revocation procedures, notification procedures, et cetera.

18 The Act makes it clear that the person applying
19 for the exemption is responsible for analyzing the safety
20 impacts the requested exemption could cause, and for
21 describing the specific countermeasures the person or
22 persons would undertake to ensure an equivalent level of
23 safety.

24 I want to voice ATA's strong support for this
25 approach. Federal Highway should not attempt in the

1 regulatory procedures to list or define the safety
2 countermeasures that could or should be **used by potential**
3 applicants. That would limit the creativity and thought
4 processes of the applicants themselves.

5 FHWA should, however, consider providing examples
6 of such countermeasures, and should also stand ready to
7 assist the applicants by providing information on the types
8 of safety impact analyses that might be included in an
9 application.

10 However, because the exemptions may be issued for
11 periods of up to two years, which is, of course, a
12 distinction from the waivers, there should be conditions
13 placed upon the holder of the exemption for the purposes of
14 effective monitoring by FHWA.

15 For example, an exempted party might be required
16 to maintain a DOT reportable accident rate that is at or
17 below the national average. Federal Highway might also
18 require that the company report its accident rate on a semi-
19 annual basis, for example.

20 Or in the event that the party already maintains a
21 rate well below the national average, the government could
22 place reasonable upper limits on that rate, and if exceeded,
23 could trigger federal action up to and including a
24 revocation of the exemption.

25 Alternatively, the government might require the

1 party to file descriptive reports with the agency analyzing
2 the effectiveness of the company's safety countermeasures.

3 In addition, Federal Highway should consider what
4 I would call "triggered" reporting. That is, an exempted
5 party might be required to file a report with the agency
6 only if certain events occur.

7 For example, if the company has an exemption from
8 a vehicle component regulation and its vehicle out-of-
9 service rate climbs, let's say, up to the national average,
10 that could trigger a particular reporting requirement that's
11 spelled out to the applicant.

12 There are many possible terms or conditions that
13 might be placed on a company receiving an exemption. These
14 conditions should vary, depending on the nature of the
15 exemption. And once again, I want to emphasize that Federal
16 Highway should not attempt to define these by regulation.
17 They must be determined on a case-by-case basis.

18 Renewal procedures for exemptions should be,
19 again, uncomplicated. If the party to the exemption has
20 complied with any conditions imposed by FHWA -- for example,
21 reporting certain information on a regular basis -- and the
22 party continues to meet the original application criteria,
23 and the exemption has resulted in an equivalent level of
24 safety, the party should be eligible to renew the exemption.

25 Once again, I would suggest that the RSPA

1 procedures can be used as a model. FHWA also requested
2 information on how state compliance and enforcement
3 personnel might be notified of exemptions or waivers. That
4 was *a* question written into the notice.

5 Notification through the Federal Register is
6 insufficient. We suggest that Federal Highway notify
7 directly the primary commercial vehicle enforcement agency
a in each state about each waiver or exemption.

9 We would suggest that the notification letters
10 sent to each state agency include a statement referring to
11 the mandatory preemptive effect of the waiver or exemption.

12 Each waiver or exemption might be assigned a
13 number, and each party receiving an exemption could be
14 issued a document with the number. These identification
15 numbers could allow the enforcement personnel to do their
16 jobs effectively.

17 I'd like to touch on the pilot program issue
18 before I wrap up. We're very supportive of your new
19 authority pilot program. As I stated earlier, the trucking
20 industry truly believes that the authority provides FHWA
21 with a real opportunity to improve safety by advancing
22 specific safety programs and countermeasures in pilot
23 programs.

24 In order to advance the agency's safety goals,
25 however, FHWA must be willing to provide exemptions to

1 specific regs in order to advance the alternative regulatory
2 and even non-regulatory approaches.

3 In fact, ATA is very interested in cooperatively
4 participating with the government to implement operational
5 tests, just as an example, of fatigue management
6 technologies under this pilot program authority.

7 As you might be aware, the 1998 DOT Appropriations
a Act spoke to this issue, but a program has not been fully
9 implemented because of the regulatory exemption issue. The
10 sooner FHWA formalizes procedures for exemptions and pilot
11 programs, the sooner these critical technologies can be
12 tested in real-life trucking operations and FHWA can comply
13 with its congressional direction.

14 I want to reiterate, however, that the Act clearly
15 establishes the type of information that should be sought by
16 the government from parties interested in participating in
17 such programs.

18 The procedures should be developed around these
19 elements, these statutorily-defined elements and the
20 government should initially place the responsibility on the
21 requesting party to develop an appropriate safety "plan" and
22 to identify what data should be reported.

23 However, of course, Federal Highway would have to
24 be actively involved in the development of each program
25 because of its obligation to collect data, to analyze it,

1 and then ultimately to report to the Congress at the
2 conclusion of each pilot project.

3 As with exemptions and waivers, the terms and
4 conditions should differ, depending on the nature of the
5 program; therefore, the regulatory procedures should not
6 limit the possibilities by attempting to define them.

7 In wrapping up, I'd just like to again reiterate
a that ATA supports the additional flexibility that the
9 government now has to initiate programs and to issue waivers
10 and exemptions, and we are certain that the agency will use
11 the authority judiciously.

12 But, we encourage FHWA to do just that -- to use
13 it. The first step to doing so is promulgating simple,
14 understandable procedures to spell out the process for
15 interested parties.

16 We want to assist the government in any way we can
17 because we truly believe there are real opportunities here.
18 Thank you again for the opportunity to be heard, and we look
19 forward to the expedited agency action on this issue. And
20 I'll be happy to attempt to answer any questions you may
21 have.

22 MR. BRENNAN: Thank you very much. I just had a
23 little question. You have focused most of your comments on
24 what a motor carrier might expect or what the industry might
25 expect. Do you have any --

1 MR. OSIECKI: That's my job.

2 MR. BRENNAN: Right. Do you have any thoughts on
3 how this might be handled for individuals, specifically with
4 CDL waivers?

5 MR. OSIECKI: Yeah, and that's why I sort of went
6 to the aside earlier and talked about the historical driving
7 record, because I believe that that has -- and I think there
a is some research which shows that that has some real
9 predictive ability to it.

10 In other words, if a person, whether they're a CDL
11 driver or not, if they have past violations on their record,
12 whatever those violations are, that has some predictive
13 validity in terms of what their future safety experience on
14 the highway might be.

15 So I think, at least in terms of what you may look
16 at when individual drivers apply for waivers or exemptions
17 -- they wouldn't necessarily be pilot programs, I don't
18 think. But that would be certainly one thing that I would
19 think you would want to look at and focus, maybe not
20 entirely but a lot of effort in collecting and analyzing.

21 MS. HOCHMAN: You made one statement -- this has
22 been ringing so I moved it over; sorry. You made one
23 statement that I just wanted some clarification on.

24 You made the statement that our authority for
25 granting exemptions shouldn't be used simply for the sake of

1 regulatory relief. So I'm just trying to get a good
2 understanding of what you believe it should be used for.

3 MR. OSIECKI: Well, in making that statement I
4 meant that -- and I followed it up by suggesting that there
5 are peak seasons, whether it be an intermodal operation or
6 an agricultural operation.

7 And we don't think just because there are peak
8 seasons or down-time seasons that that wants regulatory
9 relief. Now, you may know that there are some sort of peak
10 season exemptions already in the regulations.

11 But we don't support that solely as a
12 justification. There have to be other sort of factors there
13 which might include -- and I'm trying to think of a good
14 example as I sit here.

15 But it might include unique circumstances. For
16 example, a particular company has -- a particular area of
17 the company -- let's use the intermodal example. The Union
18 Pacific Railroad has had a lot of troubles in the recent
19 past and that has affected the intermodal drayage community.

20 Now maybe, at least in a waiver situation -- I
21 don't know about an exemption situation, but a waiver
22 situation, a limited exemption could -- a limited waiver
23 could be put into effect because of the transportation
24 crisis in this country.

25 That's a unique circumstances. The Union Pacific

1 doesn't go down the tubes very often, at least not lately --
2 not in the past, but lately it has. So that might justify a
3 waiver.

4 Again, beyond that I don't know if I can think of
5 a good example, but that's a transportation crisis which
6 obviously impacts the economy significantly. So I think
7 that in terms of its uniqueness that could justify a limited
a three-month waiver, just to move the freight wherever it
9 needs to get to.

10 MR. BRENNAN: Okay, thanks very much, Dave.

11 MR. OSIECKI: Thank you.

12 MR. BRENNAN: Next speaker is Susan Pikrallidas.

13 AMERICAN AUTOMOBILE ASSOCIATION

14 MS. PIKRALLIDAS: Good morning. I am Susan
15 Pikrallidas, managing director for government relations at
16 AAA and with me today are two representatives from AAA
17 clubs:

18 Kevin Bakewell, vice president for public and
19 government relations at AAA Auto Club South, and Dan Beal,
20 manager of public policy development for the Automobile Club
21 of Southern California. And he's also here representing the
22 AAA Western Conference of Clubs.

23 Their presence here today signifies the importance
24 AAA places on this as an issue of national significance.
25 AAA is pleased to participate in today's public meeting

1 concerning implementation of Section 4007 of the
2 Transportation Equity Act for the 21st Century, specifically
3 those provisions governing waivers and exemptions from the
4 Federal Motor Carrier Safety Regulations and those
5 authorizing pilot programs.

6 AAA is an organization of more than 40 million
7 members who comprise motorists and travelers throughout the
8 nation. It is probably safe to say that most of our members
9 have never even heard of "waivers, exemptions, and pilot
10 programs."

11 And we know our members value the goods and
12 services delivered to them by trucks. But we also know that
13 our membership is increasingly concerned about the
14 interaction of cars and big trucks on our nation's roads and
15 highways.

16 Therefore, on behalf of our members, AAA believes
17 it is important to assist FHWA in devising effective
18 regulations to implement its authority to grant waivers and
19 exemptions, and to conduct safely-constructed pilot programs
20 involving motor carriers.

21 It will come as no surprise that AAA believes the
22 primary consideration in implementing these programs should
23 be safety -- increased safety for both motorists and
24 truckers.

25 Congress agrees with that ordering of priorities,

1 as is evidenced in the conference report's legislative
2 history to TEA-21, which states:

3 It is expected the Secretary would issue
4 regulations to provide that safety would be the primary
5 consideration in deciding whether any waiver or exemption
6 should be issued, or any pilot program initiated.

7 AAA is confident that safety also is FHWA's
8 primary consideration in implementing Section 4007.
9 Beyond safety, AAA believes the agency should embrace two
10 additional goals: partnership with the states and outreach
11 or communication.

12 The impact of these programs will be felt in
13 states and communities in various ways, including impacts on
14 safety, law enforcement, and perhaps even on transportation
15 infrastructure. TEA-21's preemption clause, in particular,
16 has the potential to have serious impacts on states.

17 Moreover, states may already have implemented some
18 form of the waiver, exemption, or pilot program initiatives
19 being considered by FHWA and therefore have valuable
20 experience to share. In addition, the interests of
21 neighboring states must be considered.

22 Waivers, exemptions, and pilot programs should not
23 be used to pressure adjacent states into requesting similar
24 programs. Therefore, AAA strongly urges that FHWA involve
25 the states as full partners as these programs are designed

1 and implemented.

2 AAA also urges FHWA to err on the side of over-
3 communication with the public. Although public notice
4 invites opposition, it also builds confidence and
5 establishes honest communication with those who may be
6 affected by a program. AAA strongly urges that FHWA give
7 serious consideration to all public comments.

8 In short, AAA believes that the safety of the
9 motoring public can be most effectively served not only by
10 acknowledging the statutory authority FHWA has been given to
11 implement waivers, exemptions, and pilot programs, but also
12 by working with the agency to ensure that the regulations
13 governing these programs are written to ensure safety is
14 given the highest priority.

15 That will only happen if we give you our thoughts
16 on how the agency's procedures can provide substantive and
17 fair opportunity for the public to evaluate proposed
18 programs in terms of their effect on safety.

19 We assure you that there are likely to be
20 proposals to which AAA will object. But there also may be
21 proposals that we can support, if we believe the procedures
22 are fair and the agency has made a convincing case that
23 safety will be served.

24 The remainder of AAA's statement today will
25 address our comments and recommendations particular to each

1 of the proposed Section 4007 programs.

2 AAA AUTO CLUB SOUTH

3 MR. BAKEWELL: I apologize to the reporter for
4 dropping the mike. I hope that didn't damage your eardrums
5 in any way.

6 Good morning. I'm Kevin Bakewell, vice president
7 of public and government regulations for AAA Auto Club
8 South. AAA Auto Club South serves more than 3.2 million
9 members in Florida, Georgia and Tennessee.

10 I'm going to talk specifically about waivers and
11 exemptions and try to just hit the highlights of our
12 comments from what we've submitted to you. Regarding
13 waivers, our first comment in this area pertains to the
14 critical issue of open, timely, and two-way communication,
15 as Susan referenced.

16 Although the statute does not require public
17 notice or comment, it also does not prohibit this critical
18 component. AAA believes that FHWA should take full
19 advantage of all opportunities to communicate its goals in
20 motor carrier safety and therefore recommends that FHWA
21 provide formal public notice of waivers.

22 A notice in the Federal Register would not be
23 burdensome and would at least communicate the public
24 interest to be served by the waiver. Such notice would also
25 signal to the public that the agency values communication,

1 which is so important for the public to feel like **they're a**
2 part of the process.

3 We further recommend that FHWA approach states and
4 communities affected by the waiver again as partners and
5 provide notice sufficiently in advance so that their
6 objections, recommendations, or concerns regarding the
7 proposed waiver may be fairly and adequately considered and
8 make them a part of the process.

9 AAA also urges FHWA to clearly define the term
10 "public interest" in its rule implementing the waiver
11 authority. Clear definitions are critical to public
12 understanding and acceptance.

13 Moving on to the area of exemptions, AAA
14 recommends that the regulations governing requests for
15 exemption go beyond those required "at a minimum" in the
16 statute and should include some of the following areas:

17 The public interest to be served by the exemption;

18 A clear statement of the necessity for and purpose
19 of the exemption;

20 An analysis of the enforcement impacts of the
21 exemption and, if substantial, how cost recovery to states
22 might be achieved;

23 And then identification of the economic benefits
24 to participants.

25 Again, in the area of exemption as well as

1 waivers, AAA urges FHWA to approach the states as partners
2 and actively seek their comments, recommendations, and
3 concerns about the exemption's effect in their
4 jurisdictions.

5 AAA also recommends that there be a limit on the
6 number of exemption renewals. Criteria for renewal should
7 include the person's performance and compliance during the
8 term of and exemption. And in support of FHWA's goals,
9 exemptions should not substitute for changes in law or
10 regulation.

11 A Florida situation illustrates this point. And
12 let me emphasize that this brief example is not intended to
13 discuss the merits of any particular program, but rather to
14 illustrate how exemption processes can be pushed further
15 than their intent.

16 In Florida, and perhaps in other coastal states, a
17 truck driver involved in the transport of containerized,
18 non-divisible loads from ships involved in international,
19 maritime commerce -- very specific criteria -- may obtain
20 from the State DOT what is called an overweight permit.

21 This is allowed by rules promulgated by the State
22 DOT, and in compliance with the federal guidelines in this
23 area. This type of permit allows these trucks to carry up
24 to 95, 000 pounds in those limited situations, versus the
25 standard 80, 000 maximum.

1 For the most part, AAA Auto Club South has no
2 problem with this type of permitting, as it is for a very
3 specific need and is truly the exception and not the rule.
4 In recent years, trucking interests in Florida have pushed
5 the FDOT -- Florida DOT -- in both the rule-making and
6 legislative process -- to broaden the definition of what is
7 a non-divisible, containerized cargo and also to expand the
8 issuance of overweight permits to all other trucks.

9 The net effect in this example would be tantamount
10 to raising the maximum allowable weight limit in Florida to
11 95,000 pounds. When legislative and rule-making attempts
12 failed, the trucking interests sued the FDOT in federal
13 court to have the rule that they promulgated declared
14 unconstitutional.

15 Again, this example is not intended to judge the
16 merits of permitting or of the business interests of any
17 industry, including the trucking industry. But it does
18 provide a very real-world example of how the process of
19 establishing exemptions to laws and regulations can be
20 pursued as substitutes for those laws and regulations, which
21 I don't think anybody wants to happen.

22 And now I'll turn it over to my partner from the
23 West Coast.

24 AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA

25 MR. BEAL: Thank you, Kevin. I'm Dan Beal. I

1 represent the Automobile Club of Southern California, but
2 also the Western Conference of AAA Clubs, which is
3 essentially every AAA affiliate west of -- including Texas
4 and Colorado, as well as three Canadian provinces.

5 I'll talk a little bit about the pilot program and
6 the pre-emption sections of the proposed rule-making under
7 Section 4007.

8 AAA recognizes that the pilot program provision is
9 a potentially contentious provision of TEA-21. And we
10 recommend that the pilot program elements that will be
11 proposed go beyond those which are identified in the
12 legislation as at a minimum.

13 So we would suggest that the elements include
14 a clear statement of the pilot program's goals, what is
15 intended to be demonstrated, and the public benefit to be
16 achieved by the goals;

17 An identification of the economic benefits to
18 participants and the public of the pilot program;

19 And an identification of the enforcement impacts
20 of the pilot and, if they are substantial, how cost recovery
21 to states might be achieved.

22 Secondly, as has been pointed out under the waiver
23 exemption provisions, AAA strongly urges the agency to
24 involve states in pilot programs as partners. The statute
25 requires that, other than through public comment, states

1 merely need to be informed of the pilot and of the approved
2 participants in the pilot.

3 But because of the highly controversial nature of
4 this pilot program provision, AAA believes FHWA must ensure
5 that outreach and communication are complete and forthright.
6 States should be treated as full partners and participate in
7 the design and approval of pilot programs, and should be
8 able to identify and analyze potential enforcement and
9 possible infrastructure impacts.

10 Also, we urge FHWA to define the term "equivalent"
11 as it is used in the phrase "a level of safety that is
12 equivalent to, or greater than, the level of safety that
13 would otherwise be achieved through compliance with the
14 regulations."

15 The conference report legislative history suggests
16 that "equivalent" describes a reasonable expectation that
17 safety will not be compromised. But that begs the question
18 of what is meant by "reasonable expectation."

19 Moreover, AAA would argue that achieving an
20 "equivalent" level of safety is not a proper goal if the
21 current program or regulatory scheme is substandard in
22 achieving safety, in other words, perpetuating a below-
23 standard situation.

24 In short, because this phrase as defined in the
25 **legislation** is central to FHWA's ability to implement pilot

1 programs without facing continued litigation, AAA believes
2 "equivalent? must be adequately defined before the
3 regulations are finalized.

4 I'd like to provide a bit of an example on pilot
5 programs. It was very important to us in California and
6 it's an example, in our opinion, of how not to implement a
7 pilot program.

8 And again, we do not mean to comment on the merits
9 of the proposal. Rather, the intent is to illustrate how
10 the lack of a clear process and a failure to communicate
11 created problems.

12 In 1997, segments of the industry proposed a
13 demonstration program of triple trailer use on Interstates
14 15 and 40 between the Nevada and Arizona borders to the
15 Barstow-Victorville area in California's Mojave Desert.

16 From AAA's perspective, the proposal was flawed
17 because it did not clearly communicate its goals, and
18 important information was not forthcoming to those who
19 wanted to assess the proposed project's impact on safety and
20 infrastructure.

21 The proposal was ill-defined. Basic questions
22 such as participants, number of trucks and trailers, cargos,
23 and the length of the demonstration period were not defined.

24 What was intended to be demonstrated in the
25 evaluation of the demonstration was not defined. Operating

1 characteristics were not specified, such as operation during
2 heavy traffic or adverse weather.

3 Infrastructure impacts were not addressed.
4 Economic benefit projects were not backed by sound data, and
5 key information was not provided in a timely manner.
6 We're not using this example to illustrate whether the
7 California demo was a good project or not.

8 In fact, we didn't know enough to evaluate whether
9 it was or not. Rather, we believe this illustrates the
10 pitfalls of poor communication and regulatory procedures
11 that do not provide clear statements to the public about a
12 program's goals or ensure a fairly-administered process that
13 will gather all relevant data, facts, and views.

14 On the Preemption Section, we believe that the
15 Preemption Section very strongly argues for including states
16 as full partners. States should identify which state laws
17 and regulations would be preempted.

18 The Secretary should identify how such laws would
19 be preempted, the extent and scope of the preemption, and
20 the procedures proposed to ensure safety does not suffer as
21 a result of preempted state laws. This information should
22 be made available to the public for review and comment.

23 And to summarize, AAA believes implementing
24 Section 4007 could involve risks. We clearly stated to
25 Congress during consideration of TEA-21 that this authority

1 should be narrowly structured and implemented under the
2 strictest guidelines.

3 We applaud your decision to hold this public
4 meeting in advance of formal rule-making procedures to give
5 groups such as AAA an opportunity to guide your thinking.
6 As we stated at the outset, AAA's primary interest in all
7 motor carrier regulations is safety.

8 Congress made clear its agreement with that
9 ordering of priorities, and AAA is confident the Federal
10 Highway Administration will strive to meet its
11 responsibilities in a manner that will also ensure that
12 safety remains paramount.

13 AAA also urges that FHWA approach states as full
14 partners in designing exemptions and pilot programs. States
15 have a wealth of experience and knowledge that would be
16 useful; they also can provide valuable information on the
17 impacts exemptions and pilot programs would have on highway
18 safety and enforcement in their jurisdictions.

19 And finally, we urge FHWA to communicate,
20 communicate, and communicate. It is only when the public
21 believes it is fully and accurately informed that it is
22 willing to accept new and unfamiliar concepts. And again,
23 we appreciate our opportunity to share AAA's views with you.

24 MR. BREN-NAN: Thank you very much.

25 Mr. Bakewell, I know your example was not intended

1 to be a substantive example as such, **but you** don't envision
2 here that we have the authority to waive or **exempt** parts of
3 the size and weight law?

4 MR. **BAKEWELL**: Certainly not. No, I understand
5 that. But again, it was just an example of how the process
6 tried to be used in a way that was beyond the scope of its
7 authority. And again, it did not -- it did not succeed and
8 those rules are still in place.

9 MR. **BRENNAN**: Just an aside, that you should
10 certainly take a lesson from what Congress has told us and
11 everything. But I don't think we should take the lesson
12 from Congress as how they implement demonstration projects.

13 MS. **PIKRALLIDAS**: We agree.

14 MS. **HOCHMAN**: I do have a question. You've all
15 suggested that we approach states and work with states as
16 full partner. And so, I'm wondering if you have any
17 suggestions on a process or a particular mechanism that
18 would create that full partnership.

19 MR. **BAKEWELL**: I'm really nervous about this
20 microphone.

21 MS. **PIKRALLIDAS**: You should be. Off the top of
22 our heads, no, but it's certainly something we would be
23 willing to address. Any way that we could help, we would be
24 more than willing to do.

25 I think perhaps identifying once the exemption

1 request is made or whether the request is made for a pilot
2 program, or whether it's a pilot program within something
3 that's internally proposed by FHWA, immediately identifying
4 the scope of it and where it's going to be effective, what
5 particular states would be involved and perhaps neighboring
6 states, maybe an immediate outreach to those states for a
7 teleconference just to let them know what's being proposed,
8 what you're considering.

9 And could you in writing or briefly orally discuss
10 with us would this be a problem in your state. And here are
11 the questions we would need to have answered before we could
12 adequately consider whether it's a good program or an
13 exemption.

14 Again, I'm sure we'd be willing to provide some --
15 during the rule-making procedure or ahead of time if you'd
16 like -- some thoughts about that.

17 But I think it's initially just letting them --
18 the ones who -- the states particularly who would be
19 involved know about it, and an opportunity to identify for
20 you some of the problems they see, and then maybe a more
21 formal procedure where they could give you background data
22 and statistics or information on the effects as you go
23 forward. But we'll be happy to provide some further
24 thoughts on that if you'd like.

25 MR. BRENNAN: When you do that, I would like you

1 to pay particular attention to the Federal Advisory
2 Committee Act. That's just to make sure that we can stay
3 within that while we --

4 MS. PIKRALLIDAS: Right.

5 MR. BRENNAN: Thank you very much.

6 MS. PIKRALLIDAS: Thank you.

7 MR. BRENNAN: Can we take a five-minute break,
8 please.

9 (A brief recess was taken.)

10 MR. BRENNAN: We can resume now. And the next
11 speaker is Brian Deery from the Associated General
12 Contractors.

13 While we're waiting for Mr. Deery, I had two
14 questions at the break and I wanted to kind of make this a
15 little bit clear. We have a little bit of a problem with
16 requests for exemptions or waivers actually before -- that
17 were in the agency before June 8th, with the enactment, the
18 date of enactment.

19 What we've done in trying to split the baby is to
20 say that any application that was received and in process
21 before June 8th would continue to be reviewed, but what
22 would be issued would be at most a two-year exemption under
23 the new law.

24 Anybody applying after June 8th would have to wait
25 until we have the procedures in place under which to file.

1 So that's the approach we've taken so far and it was still
2 obviously necessary to have notice and comment.

3 I'm sorry. Mr. Deery?

4 ASSOCIATED GENERAL CONTRACTORS

5 MR. DEERY: Yes. Good morning. Thank you very
6 much for allowing us the time to submit some comments. I
7 have some very brief comments I wanted to submit this
8 morning. My full written testimony has been submitted for
9 the docket.

10 And I am Brian Deery. I am the senior director of
11 the highway division at the Associated General Contractors
12 of America. AGC is a national association representing
13 32,500 construction-related businesses, including 7,200 of
14 the nation's leading general contracting firms.

15 Many AGC members use trucks in their construction
16 operations and are therefore impacted by the Federal Highway
17 Administration's Federal Motor Carrier Safety Regulations.
18 In particular, the hours of service requirements in these
19 regulations impact significantly on the construction
20 industry.

21 AGC believes that the construction industry truck
22 drivers operate under conditions and in a manner that does
23 not lead to the fatigue and alertness problems that impact
24 safe vehicle performance.

25 Therefore, AGC believes that the hours of service

1 restrictions are unnecessary for construction **industry**
2 drivers. We recommend that the industry be exempted from
3 the hours of service restrictions.

4 AGC is pleased that Congress has granted FHWA
5 authority to grant waivers and exemptions to the motor
6 carrier safety regulations, including the hours of service
7 restrictions.

8 Congress has also granted FHWA authority to
9 establish pilot programs to evaluate alternatives to
10 regulations relating to, or innovative approaches to motor
11 carrier, commercial motor vehicle and driver safety.

12 AGC calls on FHWA to use these new authorities to
13 grant the broad exemption from the hours of service
14 restrictions for the construction industry. No other set of
15 regulations are considered more onerous to the industry than
16 these restrictions and the attendant requirements that go
17 along with them.

18 And from our point of view, they have the least
19 positive impact on safety in construction. And as I said, I
20 gave a detailed -- detailed comments that we've submitted to
21 the record before on hours of service, detailing why we
22 think the industry is unique and why it should be exempted.

23 We recognize that FHWA has had this authority to
24 waive these regulations since 1984 and we has called on the
25 agency to do that, but no exemption has ever been granted.

1 And from our point of view, no attempt has ever been made to
2 determine the merits of the arguments in favor of an
3 exemption for the industry.

4 We believe that allowing such an exemption will
5 have no negative impact on safety. Many states already
6 offer varying degrees of exemptions or modifications for the
7 construction industry from the hours of service restrictions
8 for intrastate commerce with no apparent negative impact on
9 safety.

10 We believe there is no reason for this exemption,
11 that granting this exemption nationwide would have any
12 different consequence.

13 In your notice you have asked for specific
14 comments on how the waivers/exemptions would apply, and
15 frankly, at this point we are really not ready to offer any
16 detailed comments on those issues.

17 We are convening a panel of our members to address
18 this, and we hope to submit to you a more detailed
19 presentation in the future.

20 Just a couple of points we'd like to make on your
21 notice:

22 At several points in the announcement you talk
23 about "persons" in a singular sense, rather than as a group.
24 We think that Congress clearly intended that all three of
25 these mechanisms: waivers, exemptions and pilot programs to

1 apply to "groups of persons" and, by extension, we think, to
2 industry groups.

3 We think that a broad exemption should be granted
4 and only those found to be "bad actors" should be excluded
5 from the exemption.

6 We believe that a biannual review of safety and
7 accident statistics should determine whether the industry
8 exemption should continue.

9 And finally, we believe that where there is no
10 significant increase in accidents, the exemption should
11 continue.

12 Again, we don't have a detailed proposal on how we
13 think an exemption or waiver provision would work for the
14 industry, but we intend on submitting something to you on
15 that in the future.

16 MR. BRENNAN: Thank you. I must say, you're a
17 little premature with your request for an exemption, since
18 this is for -- this whole hearing or meeting has to do with
19 the process and not necessarily with the merits of any
20 individual request.

21 But I think you probably know that we are
22 addressing hours of service and separate rule-making. And
23 that will be issued -- and I say optimistically -- within
24 the next -- probably next two months, and you'll have ample
25 opportunity then to submit your comments on the hours of

1 service rule and how we might address or not address that
2 particular issue.

3 And I think that while the rulebook is open, we
4 would like to deal with it in the rule, rather than through
5 an exemption process.

6 MR. DEERY: Thank you very much.

7 MR. BRENNAN: Thank you.

8 Kristen Manos.

9 **PETROLEUM MARKETERS ASSOCIATION**

10 MS. MANOS: My name is Kristen Manos and I'm
11 government affairs counsel for the Petroleum Marketers
12 Association of America.

13 PMAA appreciates the opportunity to give oral
14 comments on this rule-making today. The Petroleum Marketers
15 Association of America represents over 8,000 small business
16 marketers of petroleum products across the country.

17 As part of their business, most marketers engage
18 in the hauling and distribution of these products to a
19 multitude of customers, both end users and ultimate vendors.

20 Because petroleum products are classified as
21 hazardous materials under the law, marketers take the safe
22 transportation of these products very seriously, especially
23 in regard to regulations governing drivers' hours of
24 service.

25 The Federal Register Notice of Proposed Rule-

1 Making on July 29 asks industry to address specific
2 questions in regard to the new statutory language of TEA-21
3 for exemptions, waivers and pilot programs.

4 Our interest is in the latter two of these
5 provisions, yet the following comments are specific only to
6 the pilot program portion of the rule and are organized
7 based on the five questions specifically delineated in the
8 NPRM.

9 In regard to procedural rules, PMA believes that
10 for purposes of the pilot project rule, Federal Highway
11 Administration must develop rules consistent with the
12 enabling legislation, as well as have the appropriate
13 procedural elements for smooth implementation of the rule.

14 The rule should be broken down into seven major
15 sections. I will touch on three of them not specifically
16 outlined in the statutory authority. The other four are
17 those outlined in the statutory authority.

18 First, Petition to Initiate Pilot Project. A
19 process should be outlined whereby individuals and/or groups
20 may petition the agency to initiate a pilot project that is
21 in addition to the process allowed under 49 CFR 389.31,
22 petitions to initiate rule-making.

23 Such a petition should contain a level of detail
24 about the requested pilot project that would begin to
25 outline the program elements of the rule.

1 Second is time line. The rule developed by
2 Federal Highway Administration should carry with it specific
3 time frames for action at all levels of program development,
4 although at this time we do not make actual recommendations
5 of this nature.

6 Notice to States: The rule should formalize a
7 process by which states are notified of the Pilot Project
8 and asked to participate in the development, implementation
9 and monitoring, as this is important in ensuring the safety
10 of these programs, extremely important, PMA believes.

11 In regard to the detail of the regulation, PMA
12 believes that rules for the Pilot Program implementation
13 should be specific to the extent that it is clear to the
14 agency, state and regulated community what must be included
15 to gain the approval of the Federal Highway Administration,
16 yet at the same time allow enough flexibility in the process
17 that certain types of projects aren't unduly prohibited
18 because they are not able to make a specific showing or
19 demonstration.

20 The rules should allow for all types of projects,
21 including those that are industry-specific, state-specific,
22 rule-specific, and/or seasonal or regional in nature.

23 In regard to conditions that should be attached to
24 a waiver or exemption or pilot program, PMA believes that in
25 situations where motor carriers are given special treatment

1 under these regulations, including participation in the
2 Pilot Program, that in addition to compliance with this
3 rule, they must maintain a satisfactory safety-fitness
4 rating as a condition of participation.

5 In regard to monitoring of participants,
6 monitoring of these programs -- especially Pilot Project
7 Programs -- should be done by requiring participants to
8 submit periodic reports as part of the FHWA Plan.

9 Additionally, PMA suggests the Federal Highway
10 Administration consider the creation of small, program-
11 specific agency appointed review boards consisting of agency
12 personnel, affected state regulators and industry
13 representatives, who would be responsible for overall
14 monitoring of an individual program.

15 The review board should be given periodic updates
16 regarding their specific program, as provided by the FHWA.
17 In this way, Pilot Programs will be treated with the utmost
18 level of seriousness, with meaningful consideration being
19 given to all aspects of the process.

20 The review board could also be available to advise
21 the Secretary at his request as to key elements of rule
22 implementation, in addition to monitoring, including
23 revocation of participation; program termination; the report
24 to Congress; and other items as the Secretary may request.

25 In regard to term for renewal, PMA believes that

1 generally pilot projects should be on a non-renewal basis,
2 unless the agency determines that for reasons outside of the
3 control of the participants, the pilot project was not able
4 to operate under conditions reasonable for accumulating
5 statistically valid data sets. In that instance only should
6 renewal be allowed.

7 In regard to state compliance and enforcement
8 personnel being notified, PMA believes that state
9 participation in the Pilot Program process is crucial to
10 successful uses of this rule and the post-project data sets
11 that are accumulated.

12 Therefore, a section of the rule promulgated by
13 FHWA to implement this program should include, as I
14 mentioned before, a formal state notification process for
15 affected state agencies, in addition to the Federal Register
16 notice requirements.

17 In conclusion, PMAA would like to stress the need
18 for safety and flexibility within this rule to the extent
19 that all worthwhile Pilot Program ideas are eligible for
20 consideration, and able to fit within the scope of the
21 overall program.

22 As you may know, PMAA originally obtained a
23 specific pilot project provision in 1995 that allowed a 24-
24 hour restart for oil heat delivery drivers, conducted in up
25 to five states over the course of one winter, which was to

1 be the winter of '96-'97.

2 The project failed because of delayed
3 implementation at Federal Highway Administration, coupled
4 with an unseasonably warm winter. This year PMAA obtained
5 the same language in TEA-21, allowing the same project,
6 conducted over a two-winter period.

7 Unfortunately, for political reasons, the
8 provision was lost in the technical corrections bill; yet
9 Senator Chafee and Congressman Shuster and others have
10 specifically requested that we use the 31315 (c) language to
11 accomplish this goal.

12 I have included some attached legislative history
13 that refers specifically to our pilot program that was lost
14 and where the conferees asked us to specifically use this
15 section to accomplish these goals.

16 As such, I am also submitting the original rule
17 developed by Federal Highway Administration on January 29,
18 1997 with our comments, to assure that they become a part of
19 this docket as well.

20 It is the hope of PMAA, as well as the request of
21 several members of the IST Transportation Conference that a
22 program similar to the one outlined in the January 29, 1997
23 rule, which is attached, fit comfortably within the
24 constructs of the rule we discuss here today.

25 Thank you.

1 MR. BRENNAN: Thank you very much. That's a very
2 intriguing idea about this review board. I hope when you
3 submit, or if you do get a chance to submit further comments
4 to the docket, you might flesh that out and see how that
5 might be strategically done.

6 MS. MANOS : Well, as has been mentioned before in
7 the comments, we don't believe that this provision and
8 others should be used exclusively for regulatory relief.
9 The pilot program language should be used to collect
10 statistically significant data sets in order to use for
11 further rule-makings.

12 It's very clear the trouble we've had in talking
13 to Congress, as well as Federal Highway Administration,
14 about we would like under the hours of service regulations,
15 that we need more statistically valid data, especially in
16 this specific industry. And that's what we're trying to
17 accomplish with this data set.

18 MR. BRENNAN: You say this project failed. I
19 don't know that it failed, it's just that it's got to get
20 off the ground. Did you suffer any kind of hardship because
21 of it, because it didn't get off the ground soon enough, do
22 you think?

23 MS. MANOS: Hardship from what perspective? The
24 trade association spent a great deal of resources in
25 developing the program, lobbying the program, working with

1 Federal Highway Administration, working with the state
2 agencies.

3 It was one where state agencies had to petition in
4 working with members of a regulated community to get them
5 signed up. It was a very big project for us that we were
6 very proud to have done in the fact that it sort of failed
7 at the last minute due to a number of reasons.

8 It was very disheartening to us, and that's why
9 we've moved aggressively toward trying to get it again. I
10 mean, we were so close, almost there. I don't think from a
11 policy perspective we've suffered.

12 I think it makes our case even better at this
13 point in asking Federal Highway Administration to consider
14 such a pilot project. As they move forward in their
15 selection and as they develop the rule we want to make sure
16 that as this rule is developed that a pilot project similar
17 to -- doesn't have to be exactly alike -- but similar to the
18 one that we were given before, it's able to fit within the
19 constructs of this rule.

20 MR. BRENNAN: Once again, I also -- as I reminded
21 the last speaker that we are having an hours of service rule
22 that is proceeding under a different heading. And I think
23 these probably are appropriate.

24 MS. MANOS: And we have submitted voluminous
25 comments to that rule-making, sir.

1 MS. HOCHMAN: I have one more question about the
2 concept of review boards that maybe you can clarify if you
3 write more comments, or your group can give it some more
4 thought. And that is, you suggested that they be created
5 for each one of the pilot exemptions or the pilot programs.
6 Is that --

7 MS. MANOS : Yes.

8 MS. HOCHMAN: -- what you meant by that? So
9 you'd have separate review boards for any particular pilot
10 program that you might --

11 MS. MANOS: That's what the thought was.

12 MS. HOCHMAN: Rather than one that judges the
13 whole or creates conditions --

14 MS. MANOS: Exactly.

15 MS. HOCHMAN: -- for the whole.

16 MS. MANOS : That's what the thought was, and I
17 apologize for not having gotten to my point when I started
18 talking before.

19 But we would like a small group of people who
20 really, really care about the project, both within Federal
21 Highway Administration at the particular states that are
22 affected and in the regulated community.

23 And I didn't add in here safety individuals from
24 safety associations -- AAA, perhaps. But they would
25 certainly be welcome as well. To really give meaningful

1 consideration to what we're doing, I mean, we want to come
2 out of here with a meaningful data set that can be used for
3 regulatory relief in this area, in hours of service, to
4 develop comprehensive rules that provide the relief to the
5 industry without sacrificing any type of safety.

6 We feel that if there is a small group of
7 dedicated individuals who want to be there and who -- you
8 know, are going to give this meaningful consideration, that
9 at the end of the day we will have, as I've said before, a
10 more meaningful data set.

11 MR. BRENNAN: Thank you very much.

12 MS. MANOS: Thank you.

13 MR. BRENNAN: Do we have anybody else that wishes
14 to speak at this time?

15 DR. DONALDSON: I do.

16 MR. BRENNAN: Mr. Donaldson.

17 ADVOCATES FOR HIGHWAY AND AUTO SAFETY

18 DR. DONALDSON: I don't have a statement. Thanks
19 for letting me talk, Paul. I wanted to address some of the
20 things --

21 MR. BRENNAN: Could you identify yourself.

22 DR. DONALDSON: Yes. I'm Gerald Donaldson. I'm
23 the senior research director for Advocates for Highway and
24 Auto Safety. And as I say, I appreciate the opportunity to
25 be able to make some remarks.

1 I wanted to mention a couple of items that were
2 brought up earlier in testimony today and then I wanted to
3 talk about something which I think is lying in the
4 background which really hasn't been addressed by anyone
5 today which I think the agency is aware of.

6 And I think the agency has struggled with and
7 needs to be addressed in a straightforward and candid
8 manner, and whatever notice and final regulation is adopted
9 that will govern the use of waivers, exemptions, and pilot
10 programs.

11 First of all, there was a mention with the first
12 witness of the day about not using exemptions for regulatory
13 relief.

14 I think that there are some people in this room
15 that can anticipate very well on the basis of their long
16 past experience that simply having the atmosphere of the
17 climate for the agency right now of increased discretion and
18 flexibility in the award of waivers, exemptions and pilot
19 programs, that there is a strong potential that the agency
20 could suffer a flood tide of applications for waivers and
21 exemptions.

22 Pilot programs is a different matter which has
23 heretofore never been visited on the agency to the
24 proportions that might be possible in the future.

25 And I think there's a lot of people here that can

1 see that coming and perhaps we've even had an indication of
2 that here today. With that in mind, I'd like to narrow the
3 focus down very quickly to the issue of waivers.

4 One of the things I'm worried about waivers is,
5 there was a remark made today about not using exemptions for
6 application to people who made seasonal claims for the need
7 for some form of regulatory relief.

8 And indeed, one of the problems with advising the
9 agency of acting on the presumption that no safety
10 monitoring or safety reporting would be needed for waivers
11 is exactly the kind of atmosphere the agency would not want
12 to promote.

13 Because it would encourage those types of people
14 who could take advantage of the waiver process, the three-
15 month time limit to come in and ask for seasonal reliefs,
16 particularly for such things as the hauling of hazardous
17 materials which are agriculturally related.

18 So I think with those remarks that issue speaks
19 for itself and that the agency has to be exceedingly
20 judicious about how the shortest form of regulatory
21 exemption, the three-month waiver, will be governed by its
22 procedures and its regulations.

23 Because it wants to, in a sense, run in fact a
24 fairly tight ship on that so it doesn't have every Tom, Dick
25 and Harry jumping out of the woodwork and demanding a short-

1 term exemption, that is, a short-term waiver.

2 Secondly, one of the things that I also worry
3 about in the conduct particularly of pilot programs is how
4 the agency is going to use the concept of a performance
5 standard.

6 I for one, who have been involved with the Office
7 of Motor Carriers for many years and have tracked the
8 regulations and the other policy statements that have come
9 out of OMC, I have never to this moment ever gotten a clear
10 understanding of exactly what the OMC believes a performance
11 standard is.

12 At one time, the kiss of death was given to the
13 notion of hard number standards, and yet now, today, and by
14 the agency itself, we have pried up as one of the most
15 exemplary indications of a performance standard, is a hard
16 number accident rate.

17 So I don't know what to make of that. But one
18 thing that I am sure is that if a performance standard can
19 be or is a hard number accident rate -- as is the case right
20 now with the pending pilot program for single-unit trucks
21 between 10,000 and 26,000 pounds, one of the things for sure
22 that we have to acknowledge here is that this performance
23 standard is being regarded by the agency now is not being a
24 hard number threshold, which if exceeded automatically
25 triggers ejection from participation in the program.

1 And I worry about that. I worry about that
2 because I don't know any longer what it means to invoke or
3 to enshrine a hard number accident rate if the agency's
4 gloss on it in its own notice is that this will give the
5 agency some pause and give grounds for reconsideration of
6 whether the participants should continue in the program.

7 What does the accident rate mean if it is not the
8 basic threshold that a carrier has to either observe, or if
9 he crosses it, then he's out of the program?

10 But the one that I really want to hit today is the
11 issue which I think has been looming larger and larger ever
12 since Congress has acted and we have participated in the
13 creation of a good deal of the narrative that's in Section
14 4007.

15 And that is, the T-Rex that's hiding in the closet
16 called Pilot Programs in Science. Or if you like, if you
17 want a 3-P versions, I call it the Pilot Program Paradox.

18 And the Pilot Program Paradox is that, yes, I
19 share the enthusiasm of the young lady who was up here a
20 little while ago that I would like to have statistically
21 valid data sets coming out of pilot programs.

22 But we all have to acknowledge that the agency has
23 been saddled with -- and I'm even going to be sympathetic
24 here -- an almost insuperable problem by Congress where
25 Congress has said we want you to test innovative ways of how

1 perhaps some regulations might be modified or even
2 eliminated to see if there are both safety and economic
3 efficiencies for the industry.

4 And yet, at the same time, we want you to minimize
5 the number of participants to the absolute lowest number
6 possible in order to control risk exposure. We want you to
7 make sure that either the highest standard of safety is
8 obtained or as the closest approximation thereof that you
9 can ensure.

10 And so, what you have here on your hands is an
11 agency that's been asked to come up with regulatory policy
12 decisions on the advisability of regulations, when we all
13 know the legal firmament that underlies the agency is that
14 the standards themselves, by the mere fact that they exist,
15 are legally presumed to have been necessary.

16 So when the agency says that it's going to allow
17 some lapse in their observance or their prosecution in the
18 field, how are you going to come up with any scientifically
19 valid results?

20 If you have to limit risk exposure, selectively
21 run through the potential participants that will comprise
22 the cohort for the field experience to those who have the
23 most sterling safety records in which you have already
24 introduced the most fundamental confounding variables into
25 the study plan so there is no way on God's earth you could

1 ever possibly have any scientifically valid results from the
2 experiment.

3 This is something that the agency has to address.
4 I don't know exactly how you're going to address it. But if
5 you regard each pilot program as a test of the dictum that
6 all that succeeds is success and that each one is a unique
7 ad hoc enterprise, the agency will have every one of its
8 pilot programs riven with controversy because you will be
9 caught between the rock and the hard place.

10 The rock is probably going to be the industry
11 demanding some form of regulatory exemption, and regarding
12 the pilot program, it's simply the testing stage where you
13 have to endure three years of a pilot program till finally,
14 after the foot is in the door, your whole body can get
15 through the door and the exemptions can be ratified in
16 perpetuity.

17 And the hard place, which are people like me in
18 the safety community, who are going to say you can only use
19 the results of this pilot program for anecdotal purposes;
20 they have no scientific validity whatever, you can't make
21 statistically valid inferences from them.

22 And then we're going to have the same controversy
23 that I think has basically paralyzed the pilot program from
24 10,000 to 26,000 pounds.

25 So that's the T-Rex in the closet and the agency

1 must address this in a candidly and straightforward manner,
2 even if to acknowledge that for the time being it is not
3 sure exactly how it would reconcile the demands of some
4 scientific issues, so scientific precision with which a
5 pilot program has to be conducted and the need to be able to
6 test some innovative departures from the current regulatory
7 scheme.

8 And lastly -- and this is an appendix or an
9 addendum to those remarks -- the agency has something that
10 is a deficiency that's been going on for years and I think
11 both of you know what it is.

12 It was mentioned, for example, in notes that were
13 appended to the meeting of the expert panel regarding the
14 fatigue study a few years ago. The agency has no guiding
15 protocol for the ethics that govern the use of field
16 subjects and field experiments.

17 And right now, basically even though you are going
18 to try to run the gauntlet of the Congressional expectation
19 that you will minimize safety risk and try to elevate safety
20 to the possible -- the highest possible operating level,
21 nevertheless there are conditions out there which arguably
22 increase the risk both to the participants and to
23 themselves.

24 And the agency, unlike other agencies, does not
25 have an ethical protocol for the use of subjects in field

1 experiments. This is something you have to do.

2 You just can't go on the way you have in the past.
3 And I think that it would be advisable for you to consider
4 addressing that, at least in the preliminary way. You
5 certainly couldn't come to any conclusions that would be
6 permanent over the next two or three months in the notice
7 that you finally issue pursuant to this public meeting on
8 the topic of Section 4007.

9 And with that, I think I'll just close.

10 MR. BRENNAN: Thank you very much. As usual, you
11 put us between a rock and a hard place because you would
12 have us frozen in time permanently, according to what you're
13 saying here because all those regulations which arose from
14 the firmament in some past history and were never supported
15 by any kind of scientific data can never be changed because
16 we can never come up to satisfy your requirement for
17 scientifically established data sets and everything.

18 So how do we get out of where we are?

19 DR. DONALDSON: Well, as you saw today, even the
20 industry is calling for, quote, scientifically valid data
21 sets. But no, I agree.

22 I agree that pilot programs are something to some
23 extent that do not demand and cannot demand scientific
24 precision because the agency cannot meet both public and
25 Congressional expectations of minimizing the safety risk for

1 both the participants and all the traveling public that
2 shares the roads with motor carriers.

3 But the agency does have to do something in order
4 to be able to meet those safety demands, and at the same
5 time be able to get some foundation for policy inferences
6 which isn't simply on an anecdotal basis.

7 And if it's only on an anecdotal basis, then it's
8 going to have the controversy I referred to. I think that
9 there might be a way between Scylla and Charybdis.

10 I don't know exactly how to navigate it, but the
11 agency definitely has a responsibility to do it and to meet
12 both demands simultaneously. It's a paradox, but the
13 paradox has to be addressed by you.

14 MR. BRENNAN: Thank you very much.

15 Does anybody else want to comment now? Ken?

16 MR. PIERSON: My name is Kenneth Pierson. I'm a
17 safety management consultant. For the past 10 years and for
18 the prior 30 years, I was an official with the Office of
19 Motor Carriers, the Bureau of Motor Carrier Safety, and at
20 the Interstate Commerce Commission, the Bureau of Motor
21 Carriers.

22 My remarks will be quite short. First, I am
23 concerned in the drafting of the rules that you do not draft
24 rules of general applicability.

25 The motor carrier industry is a heterogeneous

1 collection of business entities having **nothing** in common
2 with each other except that they operate trucks on the
3 public highways.

4 And therefore, there is a need for a lot of
5 flexibility. One size does not fit all. In my experience,
6 it is possible to have standards that are flexible.

7 We must always remember that the job of government
8 is to govern. And in doing that, then there is a need for
9 discretion or the use of discretion in these kinds of
10 affairs, obviously based on a record of need but certainly
11 not one in which the test is where there is so much
12 scientific data that it's a no-brainer.

13 There is a need for some risk in the name of
14 progress. If one is to improve motor carrier safety in this
15 nation and do it through experimentation with unique and
16 novel ideas, there's a risk.

17 And I believe that the Congress and I believe that
18 the Executive branch need to take that risk and not be
19 always so concerned about absolute proof before the process
20 ever starts.

21 The next point I'd like to make is that regarding
22 paperwork and reporting. There should be a minimum of
23 paperwork and reporting. Certainly some of it is essential,
24 but certainly not to the degree all that might be desirable
25 by the agency.

1 I believe that the failure of the proposal to
2 waive certain provisions of the log-keeping died on the vine
3 because of the excessive reporting and paperwork.

4 Finally, I would like to make the point that
5 exemptions should be integrated into rule-making as quickly
6 as possible. Except under the most trying circumstances I'm
7 not supportive of renewals.

8 And as you have said in your definitions, they
9 should be granted where it is leading to something, and that
10 something should either be a termination or the granting or
11 the rule-making for a permanent rule.

12 Thank you for the opportunity to furnish these
13 comments.

14 MR. BRENNAN: Thank you, Ken. Any questions?

15 (No response.)

16 MR. BRENNAN: Our notice said that we would be
17 here all day and so we will be here all day, so in case
18 anybody shows up late.

19 We don't have any more speakers on the schedule
20 now. If there's nobody in the audience that wants to speak,
21 we will continue to be here and there will be somebody in
22 the room to direct everybody.

23 We'll probably stay around for a little while now
24 and then adjourn for lunch and come back at 1 o'clock to see
25 if anybody has come. And we'll leave messages here that we

1 will be returning at 1:00.

2 So if anybody has anything further to add, I'd
3 appreciate them coming forward now. Otherwise, you will
4 have an opportunity later if you think of something and you
5 want to come back and make a point.

6 So we will be open for comment until 5 o'clock --
7 is it 5 o'clock? Until 4 o'clock this afternoon. And we'll
8 be in this room and somebody will be here to direct anybody
9 coming as to when we will be adjourning -- resuming.

10 (Whereupon, at 10:30 a.m., the meeting was
11 concluded.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25